Chee Kuat Fong & Ors v Amalan Tepat Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02–844 OF 1999 AND W-02–845 OF 1999
RAUS SHARIF, HASAN LAH AND SULONG MATJERAIE JJCA
28 DECEMBER 2010

Civil Procedure — Appeal — Interference by appellate court — Whether findings of fact by trial judge contained obvious error in reasoning — Whether intervention of appellate court on findings made by trial judge warranted

Amalan Tepat Sdn Bhd, the respondent in both the appeals, was the developer of a resort cum residential project in Malacca known as 'A Famosa Golf Resort' ('the project'). Lee Wai Yen ('Lee'), the appellant in Civil Appeal No W-02–845 of 1999, was the project's property-cum-general manager. By his letter of appointment to that post, Lee was entitled to receive commission based on 0.8% of the total sales recorded by the developer. Based on this formula, Lee claimed against the developer for RM1,586,083.56 as commission owing to him. Likewise, the appellants ('plaintiffs') in Civil Appeal No W-02–844 of 1999, who were, at the material time, sales managers, assistant sales managers and sales executives in the project, claimed for their respective commissions based on a rate of 0.35% of the total sales of the project. The plaintiffs sought payment of their claims directly from the developer and, alternatively, from Lee through a declaration that Lee was liable to them. In its defence, the developer said the total sales of the project was only RM168,174,600 and not as claimed by Lee and the plaintiffs. It also denied having any contractual relationship with the plaintiffs saying they were Lee's appointees. Lee, in his defence to the plaintiffs' claim against him, said their claim was premature. In determining the total amount of sales to base the percentages of commission payable to Lee and the plaintiffs, it emerged during the trial that the plaintiffs were not entitled to commission unless purchasers for the project signed the relevant sale and purchase agreement and paid the 10% deposit. The list prepared by the sales manager of the project showed only the number of products sold by each of the sales staff but failed to include particulars of each sale being concluded. The High Court ruled that the developer was liable to pay the plaintiffs and Lee as follows: (i) the first and second plaintiffs to receive 20% overriding commission on what the sales executives received; (ii) the third plaintiff to receive 15% overriding commission on what the sales executives received; (iii) the fourth, fifth and sixth plaintiffs to be paid their commissions based on the formula set out in pp 91 and 93 of encl 52 (iv) payments for the plaintiffs to be set-off against the advances they had received; (v) Lee's commission to be based on 0.8% of RM168,884,300, after deducting the commission (but before

subtracting the advances taken by the plaintiffs and other staff) of the sales staff involved in the sales of the project at the material time. The court also ordered interest at 8%pa on all sums due to the claimants from date of judgment till date of realisation and that there be no order as to costs. The decision was appealed against to the Court of Appeal.

Held, dismissing both appeals with no order as to costs here and ordering that costs in the High Court granted to the plaintiffs:

(1) The trial judge's acceptance of the final total sales figure of RM168,884,300 as published by the developer had merit because it was based on entries which reflected an accurate picture in determining what each sales staff was entitled to receive (see paras 18–19).

(2) There was ample evidence to show the plaintiffs were employees of the developer. Each of them had a letter of appointment to their respective post issued by the developer and signed by Lee within his scope of work to appoint such sales personnel. The developer had also previously paid the plaintiffs salaries and commissions (see paras 15–16).

(3) Although the letters of appointment to the plaintiffs did not mention the percentage of commission payable, Lee later fixed the commissions in the letters he sent out to them as set out in pp 91 and 93 of encl 52 (see paras 20–22).

(4) As there was no obvious error in the reasoning as to the finding of facts made by the trial judge, there was no reason for the appellate court to intervene on the findings made (see para 24).

[Bahasa Malaysia summary

Amalan Tepat Sdn Bhd, responden dalam kedua-dua rayuan, adalah pemaju tempat peranginan serta projek kawasan perumahan di Melaka dikenali sebagai 'A Famosa Golf Resort' ('projek tersebut'). Lee Wai Yen ('Lee'), perayu dalam Rayuan Sivil No W-02–845 of 1999, merupakan pengurus projek serta pengurus am tersebut. Dalam surat pelantikan ke jawatan tersebut, Lee berhak menerima komisen berdasarkan 0.8% daripada jualan keseluruhan yang direkodkan oleh pemaju. Berdasarkan formula ini, Lee menuntut terhadap pemaju sejumlah RM1,586,083,56 sebagai komisen terhutang kepadanya. Begitu juga perayu-perayu ('plaintif-plaintif') dalam Rayuan Sivil No W-02–844 of 1999, yang pada masa material, pengurus jualan, penolong pengurus jualan dan eksekutif jualan dalam projek, menuntut komisen masing-masing berdasarkan kadar 0.35% jualan keseluruhan projek. Plaintif-plaintif menuntut pembayaran tuntutan mereka secara langsung daripada pemaju dan, secara alternatifnya, daripada Lee melalui satu deklarasi bahawa Lee bertanggungan ke atas mereka. Dalam pembelaannya, pemaju menyatakan bahawa jualan total projek cuma RM168,174,600 dan bukan sebagaimana yang dituntut oleh Lee dan plaintif-plaintif. Ia juga menafikan

mempunyai hubungan kontraktual dengan plaintif-plaintif menyatakan bahawa mereka adalah orang-orang yang dilantik oleh Lee. Lee, dalam pembelaannya terhadap tuntutan plaintif-plaintif, menyatakan tuntutan mereka adalah pramasa. Dalam menentukan amaun keseluruhan jualan didasarkan pada peratusan komisen dibayar kepada Lee dan plaintif-plaintif, timbul bahawa ketika perbicaraan plaintif-plaintif tidak berhak kepada komisen melainkan pemaju-pemaju kepada projek memeterai perjanjian jual beli yang relevan dan membayar deposit 10%. Senarai yang disediakan oleh pengurus jualan projek tersebut hanya menunjukkan bilangan produk yang dijual oleh setiap staf jualan tetapi gagal memasukkan butir-butir setiap jualan yang diselesaikan. Mahkamah Tinggi memutuskan bahawa pemaju bertanggungan membayar kepada plaintif-plaintif dan Lee seperti berikut: (i) plaintif dan defendan kedua menerima 20% komisen utama berdasarkan yang diterima oleh eksekutif jualan; (ii) plaintif ketiga menerima 15% komisen utama berdasarkan apa yang diterima oleh eksekutif jualan; (iii) plaintif-plaintif keempat, kelima dan keenam dibayar komisen berdasarkan formula yang ditetapkan dalam ms 91 dan ms 93 lampiran 52 (iv) pembayaran kepada plaintif-plaintif untuk set off terhadap pendahuluan yang telah mereka terima; (v) Komisen Lee didasarkan pada 0.8% daripada RM168,884,300, selepas menolak komisen (tetapi sebelum menolak pendahuluan yang diambil oleh plaintif-plaintif dan staf-staf lain) daripada staf jualan terlibat dalam jualan projek pada masa material. Mahkamah juga memerintahkan faedah 8% setahun daripada semua jumlah terhutang daripada pihak menuntut hingga tarikh realisasi tanpa perintah mengenai kos. Keputusan dirayu ke Mahkamah Rayuan.

Diputuskan, menolak kedua-dua rayuan tanpa perintah mengenai kos di sini dan memerintahkan bahawa kos di Mahkamah Tinggi diberikan kepada plaintif-plaintif.

(1) Penerimaan hakim bicara ke atas jumlah keseluruhan jualan akhir RM168,884,300 seperti yang dinyatakan pemaju mempunyai merit kerana ia berdasarkan kemasukan yang menggambarkan gambaran tepat dalam menentukan jumlah yang berhak diterima oleh setiap staf jualan (lihat perenggan 18–19).

(2) Terdapat banyak bukti yang menunjukkan plaintif-plaintif adalah pekerja-pekerja pemaju. Setiap seorang daripada mereka mempunyai surat pelantikan jawatan masing-masing oleh pemaju dan ditandatangani oleh Lee dalam skop kerjanya untuk melantik penjual sedemikian. Pemaju juga pada awalnya telah membayar plaintif-plaintif gaji dan komisen (lihat perenggan 15–16)

(3) Walaupun surat pelantikan plaintif-plaintif tidak menyatakan peratusan komisen dibayar, Lee kemudiannya telah menetapkan komisen dalam

surat-surat yang dihantar kepada mereka seperti yang dinyatakan dalam ms 91 dan 93 lampiran 52 (lihat perenggan 20–22).

(4) Oleh kerana tiada kesilapan jelas dalam alasan bagi penemuan fakta yang diputuskan oleh hakim bicara, tiada alasan bagi Mahkamah Rayuan untuk campur tangan dalam penemuan yang dibuat (lihat perenggan 24).]

Notes

For cases on interference by appellate court, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1158–1182.

K L Wong (Shazwani Abd Karim with him) (K L Wong) in Case No W-02–844 of 1999 for the appellants.

Jadadish Chandra (Arbain & Co) in Case No W-02–845 of 1999 for the appellants.

Mahendra Mahason (R Y Nanthan & Partners) in Case Nos W-02–844 of 1999 and W-02–845 of 1999 for the first respondent.

Jadadish Chandra (Arbain & Co) in Case No W-02–844 of 1999 for the second respondent.

K L Wong (Shazwani Abd Karim with him) (K L Wong) in Case No W-02–845 of 1999 for the second to seventh respondents.

Sulong Matjeraie JCA:

[1] Following the decision at the court below to consolidate and to try the two cases together, the parties hereto agreed that both cases Civil Appeal No W-02–844 of 1999 and Civil Appeal No W-02–845 of 1999 shall be heard together in this court.

PREAMBLE

[2] For convenience and ease of reference and identification, the six appellants in W-02–844 of 1999 shall, collectively, be referred to as 'the plaintiffs' as they were referred to in the court below and likewise the respondents Amalan Tepat Sdn Bhd and Lee Wai Yen shall be referred to as 'first defendant' and 'second defendant' respectively.

[3] In respect of Civil Appeal No W-02–845 of 1999, the first respondent, Amalan Tepat Sdn Bhd shall also be referred to as 'first defendant'. Likewise the second to seventh respondents shall be referred to as 'the plaintiffs'.

BRIEF FACTS

[4] The first defendant in Civil Appeal No W-02–845 of 1999 is also the

defendant that develops a resort cum residential project in Malacca known as 'A Famosa Golf Resort' ('the project') in Civil Appeal No W-02–844 of 1999. For avoidance of complication the first defendant shall hereinafter be referred to as 'the developer'.

[5] The second defendant in Civil Appeal No W-02–844 of 1999 is also the plaintiff in Civil Appeal No W-02–845 of 1999 and is known as Lee Wai Yen ('Lee'). He was the property manager cum general manager of the project at the material time.

[6] The plaintiffs in civil appeal No W-02–844 of 1999 were, at the material time, sales managers, assistant sales managers and sales executives respectively in respect of the project and shall hereinafter be referred to collectively as 'the plaintiffs'.

[7] Lee was appointed to the post of property manager cum general manager of the project by a letter of appointment dated 1 June 1994. The relevant clause of the terms and conditions of the said letter is cl 2 which stipulates as follows:

> Incentives and commission depending on the total sales performance of the month. Total sales (RM$)x.08=(RM$) will be given to you as commission shares between the sales and marketing staff.

[8] The sales recorded by the developer as at March 1996 was RM198,260,455. It is based on cl 2 above that Lee now claims that the developer owes him a sum of RM1,586,083.56 being outstanding commission due to him for the sale of the project.

[9] Likewise, the plaintiffs are claiming for their commission for the sale of the project. They direct their claims against the developer and in the alternative against Lee in the form of a declaration that Lee is liable to them. The amount claimed varies from one plaintiff to another and is particularised in their statement of claim all of which is based at the rate of 0.35% of the total sales of the project at the material time.

[10] In its amended defence against both Lee and the plaintiffs, the developer averred that the total sales was RM168,174,600 and not RM198,260,455 the amount claimed by Lee and the plaintiffs. The developer also denies having any contractual relationship with the plaintiffs as they were Lee's appointees.

[11] Lee, in his defence to the claim by the plaintiffs averred that their claim was premature and that the commission should be as set out at pp 342–344 appeal record. Lee testified personally and called another witness Ms Tan Mooi Siew.

[12] The plaintiffs testified separately by separate witness statements. The developer called its accountant, Mr Tan Kok Hua as its witness.

FINDINGS OF THE LEARNED TRIAL JUDGE AT THE HIGH COURT

[13] It is the finding of the learned trial judge that the plaintiffs shall be paid their respective commission by the developer based on the following:

(a) For the first and second plaintiffs 20% overriding commission on what the sales executives receive;

(b) For the third plaintiff 15% overriding commission on what the sales executives receive;

(c) For the fourth to sixth plaintiffs they shall be paid their commissions based on the formula set out in pp 91 & 93 of encl 52;

(d) Payments for the plaintiffs should be set-off against the advances received by the plaintiffs;

(e) Lee shall be paid his commission based on 0.8% of the *RM168,884,300*–after deducting the commission (but before subtracting the advances taken by the plaintiffs and other staff) of the sales staff involved in the sales of the project at the material time;

(f) There shall be interest of 8%pa on all sums due to the claimants from date of this judgment to date of realisation and to be paid by the developer; and

(g) There shall be no costs awarded to any party.

ISSUES

[14] On the analysis made by the learned trial judge in relation to this instant case, we agree with his reasoning that there are four issues and these are as follows:

(a) Whether the plaintiffs are employees of the developer;

(b) What is the total amount of sales to base the percentages of commission for the plaintiffs and Lee;

(c) What multiplicand to be used by the plaintiffs and Lee to rest their respective commission; and

(d) If the plaintiffs are found entitled to their commission are they to be paid directly by the developer or do they have to wait for Lee to be paid first then to claim from him later.

[15] On (a) above, we see no reason to disagree with the finding of the learned trial judge that each of the plaintiffs had a letter of appointment to their respective post issued by the developer: hence they are employees of the developer.

[16] We agree further that the letters of appointment were signed by Lee who was the general manager cum property manager and it was within his scope of his work to appoint such sales personnel. These letters of appointment are binding on the developer since the task of Lee in appointing sales personnel was within his scope of work as head of the relevant section in the Office of the developer. Furthermore, it is the finding of the learned trial judge that the developer had previously paid salaries and previous commission to these plaintiffs. We agree with the learned trial judge that these are more than sufficient to show that the plaintiffs were the employees of the developer.

[17] On (b) which concerns the issue to determine what is the actual total sales figure of the products of the sales staff at the material time, we agree with the finding of the learned trial judge in admitting the evidence of the plaintiffs that they are not entitled to their commission unless the purchasers paid the 10% deposit and signed the relevant sale and purchase agreement.

[18] It would appear to us that the list prepared by the sales manager show the number of products sold by each of the sales staff. But the list failed to include particulars of each sale being concluded. Therefore it is our view that the learned trial judge's preference in accepting the sales figures published by the developer is acceptable because they are based on entries which reflect an accurate picture in determining what each sales staff is entitled to receive.

[19] Therefore the learned trial judge's acceptance of the final total sales figure published by the developer of RM168,884,300 has merit and not without basis. We agree with his finding.

[20] On (c) the issue concerns the multiplicand. It is the finding of the learned trial judge that 8% of sales were done by the sales staff. But in respect of the plaintiffs, despite they based their claims on 0.35% of the total sales, it is his finding that there is no mention of any percentage of their commission in their letters of appointment which stipulates:

> Your commission will be set by the company depending on the target achieved.

[21] Lee subsequently fixed the plaintiffs' commission to the amount as set out in the letters that he wrote to the plaintiffs, which the plaintiffs denied having been received.

[22] The learned trial judge however made a finding that these documents were actually received by the plaintiffs when he said at p 26 appeal record as follows:

> I have considered this matter carefully, and is still of the opinion that these letters setting out the commission for the sales executives were not fabrications of Lee but documents actually sent by Lee and received by all the sales staff in employment of the developer then. Further I hold the view that the sales staff had accepted the amounts of commission stated therein. My main reasons for this conclusion are as follows: If the sales staff did not accept the amount of commission they would have left the service of the developer. Instead they all remained and continued to sell more Products. Though the plaintiffs explained that they pursued this course for fear of losing their entitlement to commission earned earlier, but not disbursed to them as yet, I find this improbable. What the plaintiffs had secured at that time was potential purchasers who made the bookings. This did not entitle them to any commission. Further, if they were unhappy over the amounts of their commission they could have complained to the directors of the developer. I do not believe that this was done. In addition, there is the evidence of PW2 who testified that these letters setting out the commission were given to all the sales staff, of whom she was one. Based on the aforesaid, I therefore find the commission due to the sales executives is as set out in pp 91 and 93 of encl 52.

[23] We have no reason to disagree with the sound analysis of the learned trial judge and agree fully with him on his finding in respect of the commission due to the sales executives.

[24] We further concur with the other findings of facts by the learned trial judge on the entitlement of overriding commission in respect of the first, second, third, fourth, fifth and sixth plaintiffs. The law on this is very clear. Unless there is obvious error in the reasoning to the finding of facts made by the learned trial judge, the appellate court shall be very slow to interfere. As such there is no reason for us to exercise any appellate intervention on the findings made.

[25] Similarly, in respect of Lee's protest to any set-off, we fully agree with the learned trial judge's decision in refusing the request for set-off by the developer when he ruled as follows:

> In respect of Lee there is an exh D1 that reveals an advancement of RM50,000 paid to him by the developer. Lee protested to any set-off on the grounds that the developer did not plead this, and his testimony never admitted this sum, nor was there any question put to him on this subject by the developer's counsel. I am in full

agreement with his argument. The developer's counsel during cross examination of Lee never raised this issue and it is unfair to deprive this party a chance to explain or deny the contents of this document. This request for a set-off by the developer must therefor be refused.

[26] On the final point (d), we fully agree with the finding made by the learned trial judge that Lee shall be paid his commission based on 0.8% of RM168,884,300 after deducting the commission (but before subtracting the advances taken by the plaintiffs and the other staff) of the sales staff involved in the sales of the products at the material time.

[27] In view of the above, we unanimously dismiss both appeals except on interest and costs. With regard to interest we vary the learned trial judge's order that the 8% interest shall run from the date of filing of the writ. With regard to costs we also vary the learned trial judge's order by substituting that costs be awarded to the plaintiffs.

[28] In view of the outcome of this appeal, there shall be no order as to costs here and the deposits to be refunded to the respective plaintiffs.

Both appeals dismissed with no order as to costs here and costs granted to plaintiffs in High Court.

Reported by Ashok Kumar